

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SHERRY PARRISH,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,

Defendant.

No. CV-08-969-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiff Sherry Parrish brings this action for judicial
3 review of the Commissioner's final decision to deny supplemental
4 security income (SSI). This Court has jurisdiction under 42 U.S.C.
5 § 405(g) (incorporated by 42 U.S.C. § 1383(c)(3)).

6 The Commissioner concedes that the case should be remanded.
7 The only issue remaining is whether the remand is for a
8 determination of benefits, or for additional proceedings before the
9 Administrative Law Judge (ALJ). I recommend that the case be
10 remanded for a determination of benefits.

11 PROCEDURAL HISTORY

12 Plaintiff filed for SSI on October 10, 2003. Tr. 10, 61-64.
13 Her application was denied initially and upon reconsideration. Tr.
14 32-33. On August 17, 2005, plaintiff, represented by counsel,
15 appeared for a hearing before the ALJ. Tr. 204-231. On September
16 15, 2005, the ALJ found plaintiff not disabled. Tr. 10-16. The
17 Appeals Council denied plaintiff's request for review of the ALJ's
18 decision. Tr. 4-6.

19 Plaintiff then sought judicial review of the ALJ's decision.
20 The case was assigned to Judge Hogan. Based on the stipulation of
21 the parties, by order dated March 12, 2007, Judge Hogan reversed
22 the final order of the ALJ and remanded the matter to the ALJ for
23 a de novo hearing. Parrish v. Commissioner, No. CV-06-685-HO (D.
24 Or. Mar. 12, 2007) (dkt #24). Tr. 245-46. Judge Hogan ordered
25 that

26 [o]n remand, the [ALJ] will re-evaluate the medical
27 evidence, in particular the opinion of Dr. Johnson. The
28 ALJ will consult with a mental health medical expert in
determining the nature and severity of Plaintiff's mental
impairments. In addition, the ALJ will obtain

2 - FINDINGS & RECOMMENDATION

1 supplemental evidence from a vocational expert to clarify
2 the effect of all the assessed limitations on the
3 occupational base, including the restriction to simple,
4 routine, and repetitive work.

5 Id.

6 Upon remand, plaintiff was referred by her disability examiner
7 to psychologist Richard M. Kolbell, Ph.D, for a psychodiagnostic
8 evaluation. Tr. 282-92. The evaluation took place in October
9 2007. Id. Next, the ALJ conducted a supplemental hearing on
10 February 6, 2008. Tr. 316-36. Although a vocational expert (VE)
11 was present at the hearing, the ALJ took no testimony from the VE.

12 Id.

13 On April 22, 2008, the ALJ found plaintiff not disabled. Tr.
14 232-44. Pursuant to 20 C.F.R. § 416.1484(d), the ALJ's decision
15 became the final decision of the Agency. Plaintiff then filed this
16 action for judicial review.

17 DISCUSSION

18 Plaintiff contends that the ALJ erred in several respects,
19 including improperly rejecting the opinions of plaintiff's
20 examining psychologists, improperly rejecting plaintiff's
21 testimony, and failing to address third-party lay witness
22 testimony. In the motion for remand, the Commissioner concedes
23 that the ALJ erred in evaluating the record and that the ALJ's
24 errors compel reversal of the ALJ's decision. Deft's Mem. in Sup.
25 of Remand at pp. 6, 8. As noted above, the only issue remaining is
26 whether the remand should be for additional evidence or for a
27 determination of benefits.

28 Defendant argues that remand for additional evidence is
appropriate here because "there are unresolved issues" and the

record does not clearly require a finding of disability. Id. at pp. 6, 7. Defendant requests a remand so that the ALJ can (1) "fully address and explain the weight assigned to the medical evidence as a whole"; (2) "reassess Plaintiff's maximum residual functional capacity"; (3) "re-evaluate the subjective testimony"; (4) "Perform new step four, and if necessary step five analyses"; and (5) "obtain vocational expert testimony." Id. at p. 8.

Defendant acknowledges the Ninth Circuit's "crediting as true rule," but contends that the Court's application of it is discretionary. Defendant, citing Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003), argues that the Court retains flexibility in applying the "crediting as true" rule to improperly rejected evidence and that the Court may instruct an ALJ to reevaluate such evidence on remand.

In a 2004 Findings & Recommendation, I previously rejected defendant's argument. In Kirkpatrick v. Barnhart, No. CV-03-657-HU (D. Or. July 22, 2004), I explained as follows:

When an ALJ improperly rejects evidence, as occurred here in the rejection of the opinions of the three examining psychologists, the court should credit such evidence and remand for an award of benefits when: "(1) the ALJ failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited." Moore v. Commissioner, 278 F.3d 920, 926 (9th Cir. 2002) (quoting Smolen v. Commissioner, 80 F.3d 1273, 1292 (9th Cir. 1996)); see also Lester [v. Chater], 81 F.3d [821,] 834 [(9th Cir. 1995)] ("Where the Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or examining physician, we credit that opinion 'as a matter of law.'").

* * *

. . . [D]efendant argues that remand for an award of

benefits is not required. Defendant suggests that the "crediting as true" rule is no longer mandatory. In Connett v. Barnhart, 340 F.3d 871 (9th Cir. 2003), the Ninth Circuit, in a panel decision, stated that it was not convinced that the rule was mandatory. Id. at 876. The Connett court noted that despite the compulsory language found in certain Ninth Circuit cases, other Ninth Circuit cases have remanded for the ALJ to articulate specific findings for rejecting the claimant's subjective testimony. Id. The court concluded that it had flexibility in applying the "crediting as true" rule.

I agree with plaintiff that earlier Ninth Circuit cases suggesting that the "crediting as true" rule is mandatory, are the cases that should guide the district court. The rule was firmly established in Varney v. Secretary, 859 F.2d 1396 (9th Cir. 1988). The issue there was whether the Ninth Circuit should adopt the "crediting as true" rule of the Eleventh Circuit. In adopting the rule, the Ninth Circuit noted that the rule promotes certain objectives: "Requiring the ALJs to specify any factors discrediting a claimant at the first opportunity helps to improve the performance of the ALJs by discouraging them from reaching a conclusion first, and the attempting to justify it by ignoring competent evidence in the record that suggests an opposite result." Id. at 1398 (internal quotation omitted). The court also noted that the rule "helps to ensure that pain testimony will be carefully assessed and its importance recognized" and that it avoids "unnecessary duplication in the administrative hearings and reduces the administrative burden caused by requiring multiple proceedings in the same case." Id. The court stated that most importantly, "by ensuring that credible claimants' testimony is accepted the first time around, the rule reduces the delay and uncertainty often found in this area of the law[,] and "ensures that deserving claimants will receive benefits as soon as possible." Id. at 1398-99 (internal quotation and citation omitted).

The rule has been followed and reaffirmed in numerous subsequent Ninth Circuit cases. E.g., Edlund v. Massanari, 253 F.3d 1152, 1160 (9th Cir. 2001); Harman v. Apfel, 211 F.3d 1171, 1178-79 (9th Cir. 2000); Lester, 81 F.3d at 834; Reddick [v. Chater], 157 F.3d [715,] 728 [(9th Cir. 1998)]. While Connett notes a handful of cases that have failed to follow the rule, a circuit court panel has no authority to disavow the holdings of a prior panel. E.g., Baker v. City of Blaine, 221 F.3d 1108, 1110 n.2 (9th Cir. 2000). That certain panels have failed to apply the rule adopted by a prior panel is no basis for the district court to ignore the law established by the earlier panel. Thus, I follow the "crediting as true" rule.

1 Kirkpatrick, Findings & Rec. at pp. 39-42.

2 Judge Marsh adopted the Kirkpatrick Findings & Recommendation
3 in a September 13, 2004 Order. In doing so, he noted that Connett
4 and other cases in which the court had exercised discretion in
5 applying the "crediting as true" doctrine involved only instances
6 where the issue was whether to credit the claimant's subjective
7 pain testimony and that "[n]o case law suggest[ed] that this
8 discretionary principle likewise applies to crediting as true
9 improperly rejected medical reports." Kirkpatrick, Order at p. 3
10 (D. Or. Sept. 13, 2004).

11 Following Judge Marsh's September 13, 2004 Order, the
12 defendant moved to reconsider, arguing that the "crediting as true"
13 doctrine was not mandatory in instances where the issue is whether
14 to credit as true improperly rejected medical reports. Judge Marsh
15 denied the motion in an October 28, 2004 Order. There, Judge Marsh
16 noted the three-part test in Smolen, quoted in Kirkpatrick, above,
17 and further noted that if "'the Smolen test is satisfied with
18 respect to the improperly rejected medical evidence, then remand
19 for determination and payment of benefits is warranted regardless
20 of whether the ALJ *might* have articulated a justification for
21 rejecting the medical opinion.'" Harman, 211 F.3d at 1179 (emphasis
22 in original." Kirkpatrick, Order at p. 3 (D. Or. Oct. 28, 2004)
23 (brackets omitted). Judge Marsh concluded that I had properly
24 concluded that the Smolen test was satisfied when crediting the
25 improperly rejected medical reports of the three examining
26 psychologists. Id. at p. 4. Thus, he concluded I did not err in
27 following the crediting as true rule in the case. Finally, he
28 alternatively concluded that even if the rule were discretionary,

1 there was no utility in a remand for further development of the
2 record and thus, there was good reason to credit as true the
3 improperly rejected testimony.

4 I adhere to my analysis in Kirkpatrick. First, I reject
5 defendant's argument that Connett changed the law. Second, if it
6 did, it did so only as to improperly rejected subjective pain and
7 limitations testimony, not medical opinions and evidence. Third,
8 under the three-part Smolen test, it is appropriate in this case to
9 credit the improperly rejected testimony. Fourth, even if the
10 application of the credit as true rule is not mandatory for
11 improperly rejected medical testimony, I exercise my discretion in
12 favor of recommending its application here.

13 Defendant has conceded that the ALJ erred in evaluating the
14 record. In its briefing on the remand motion, defendant does not
15 expressly identify the errors he concedes the ALJ made. Defendant
16 does, however, refer to "errors" in the plural and he expressly
17 notes that the ALJ erred in evaluating the record. Importantly,
18 defendant's list of issues that it would like the ALJ to reevaluate
19 upon defendant's requested remand compels the conclusion that
20 defendant agrees with plaintiff that the ALJ erred in rejecting the
21 examining psychologists' evidence. Thus, the first factor under
22 the Smolen test is met.

23 Psychologist Jim Johnson, Ph.D., examined plaintiff on
24 September 7, 2004. Tr. 177-84. Dr. Johnson performed a clinical
25 interview of plaintiff and conducted approximately eight separate
26 psychological tests. Tr. 177.

27 In his report, Dr. Johnson noted that plaintiff was
28 "distractible" and had difficulty with focus and concentration.

1 Id. He further noted plaintiff's complaints of poor energy,
2 difficulty with sleep onset and duration, with nighttime awakening,
3 and decreased appetite resulting in an approximate twenty-pound
4 weight loss in the previous year. Tr. 178. He also noted her
5 complaint of being tired all the time. Tr. 179. He found her
6 cooperative on testing and putting a good effort into everything
7 she did. Id.

8 Dr. Johnson's Axis I impressions were (1) major depressive
9 disorder, severe without psychotic features; (2) adjustment
10 disorder with anxious mood; and (3) cognitive disorder, secondary
11 to depression. Tr. 181. He also opined that she had a Global
12 Assessment of Functioning (GAF) score of 50. Id.

13 In his narrative summary, Dr. Johnson wrote that

14 [Plaintiff] . . . is severely depressed and is having
15 significant impairment in her cognitive processing as a
16 result. She is having difficulty coping on a day to day
17 basis and although she can complete most of the tasks of
18 daily living, she does this with considerable effort and
intermittent tearfulness. Her impairments in
concentration and mood are sufficient to make her an
unacceptable candidate for employment.

19 It is likely that she would have difficulty maintaining
20 her mood appropriate to be in social situations and that
21 minimal amounts of stress would be overwhelming to her.
22 She is likely to have difficulty with hearing and
23 responding to directions, staying focused and being able
to keep her mind on her work. This is complicated by the
fact that she has not worked since the early 1970's and
has not developed job skills. In her current state of
mind she is a poor candidate for vocational
rehabilitation.

24 Tr. 182.

25 In the impairment rating section of his report, Dr. Johnson
26 assessed plaintiff as having a marked limitation in social
27 functioning, a marked limitation in concentration, persistence, or
28 pace, and a moderate impairment in restrictions in activities of

1 daily living. Tr. 183. He also concluded that she had suffered
2 three or four episodes of decompensation. Tr. 184. Finally, he
3 stated that plaintiff demonstrated a residual disease process that
4 has resulted in such marginal adjustment that even a minimal
5 increase in mental demands or change in the environment would be
6 predicted to cause her to decompensate. Id.

7 Dr. Kolbell examined plaintiff in October 2007. Tr. 282-91.
8 His Axis I diagnoses were of (1) generalized anxiety disorder with
9 prominent social anxiety; (2) panic disorder without agoraphobia;
10 and (3) dysthymia. Tr. 286. He noted that plaintiff "clearly
11 suffers from anxiety," including "appear[ing] broadly anxious in
12 more circumstances than not over a fairly constant period[,] "
13 "social anxiety features that are longstanding," and "panic
14 attacks." Tr. 286. He assessed her as having moderate limitations
15 in interactions with supervisors, and the ability to respond
16 appropriately to usual work situations and to changes in a routine
17 work setting. Tr. 290. He also assessed her as having mild
18 limitations on interactions with the public and with co-workers.
19 Id.

20 In both of his decisions, the ALJ rejected Dr. Johnson's
21 opinion of plaintiff's limitations. Tr. 14, 239-40. In his April
22 2008 decision, the ALJ rejected Dr. Kolbell's mild and moderate
23 limitations. Tr. 243.

24 In his September 15, 2005 decision, the ALJ discussed whether
25 plaintiff met the criteria for Listed Impairment 12.04 concerning
26 affective disorders. Tr. 13; see 20 C.F.R. Pt. 404, Subpt. P, App.
27 1, § 12.04. The ALJ noted that Listing 12.04 required medical
28 documentation of a disturbance of mood, accompanied by a full or

1 partial manic or depressive syndrome. Id. He also noted that
2 satisfaction of both the (A) and then the (B) or (C) criteria were
3 required for the plaintiff to be considered disabled under the
4 listing. He concluded that the plaintiff had failed to meet the
5 section (B) criteria because she failed to demonstrate a marked
6 level of impairment in the categories described in section (B).
7 Id. He also concluded that she failed to meet the section (C)
8 criteria. Id.

9 The ALJ reached a similar conclusion in his 2008 decision.
10 Tr. 241. There, he addressed Listed Impairments 12.04 and 12.06.
11 He concluded, in plaintiff's favor, that she has mental health
12 impairments consistent with the 12.04 and 12.06 listings. Id.
13 But, he again found that her section (B) limitations were only mild
14 or moderate, and thus, she had no marked limitations to satisfy the
15 section (B) criteria. Id. He also found none of the section (C)
16 criteria established by the medical evidence. Id.

17 The ALJ's findings indicate that plaintiff satisfied the
18 section (A) criteria for Listed Impairments 12.04 and 12.06. When
19 Dr. Johnson's opinion is credited as true, plaintiff satisfies the
20 requirement of section (B) that she have a marked limitation in at
21 least two of the following functions: (1) activities of daily
22 living; (2) maintaining social functioning; (3) maintaining
23 concentration, persistence, or pace; or (4) the presence of
24 repeated episodes of decompensation, each of extended duration. 20
25 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.04, 12.06. As noted
26 above, Dr. Johnson concluded that plaintiff had marked limitations
27 in social functioning and in maintaining concentration,
28 persistence, and pace. Thus, plaintiff meets the section (B)

1 criteria.

2 With this, the second and third parts of the Smolen test are
3 satisfied. When Dr. Johnson's opinions are credited, it is clear
4 that the record would require the ALJ to find plaintiff disabled.
5 There are no outstanding issues to discuss. The case should be
6 remanded for an award of benefits.

7 Finally, even if the crediting as true rule were
8 discretionary, I apply it in this case. Given Dr. Johnson's
9 testimony, there is no utility in remanding for additional
10 proceedings. Furthermore, as the Ninth Circuit explained in a 2004
11 case:

12 we need not return the case to the ALJ to make a residual
13 functional capacity determination a second time.
14 Allowing the Commissioner to decide the issue again would
15 create an unfair "heads we win; tails, let's play again"
16 system of disability benefits adjudication. See Moisa
17 [v. Barnhart], 367 F.3d [882,] 887 [(9th Cir. 2004)]
(noting that the "Commissioner, having lost this appeal,
should not have another opportunity ... any more than
Moisa, had he lost, should have an opportunity for remand
and further proceedings").

18 Remanding a disability claim for further proceedings can
19 delay much needed income for claimants who are unable to
20 work and are entitled to benefits, often subjecting them
21 to "tremendous financial difficulties while awaiting the
22 outcome of their appeals and proceedings on remand."
23 Varney, 859 F.2d at 1398. Requiring remand for further
24 proceedings any time the vocational expert did not answer
25 a hypothetical question addressing the precise
26 limitations established by improperly discredited
27 testimony would contribute to waste and delay and would
28 provide no incentive to the ALJ to fulfill her obligation
to develop the record. See, e.g., Celaya v. Halter, 332
F.3d 1177, 1183 (9th Cir. 2003) (reversing the denial of
disability benefits where the ALJ failed in his duty to
fully and fairly develop the record).

Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004). Here,
defendant has twice conducted de novo hearings in plaintiff's case
and twice rendered a decision with legal errors requiring remand.

1 The crediting as true rule is properly applied in this case because
2 it is clear that the improperly discredited evidence of Dr. Johnson
3 establishes disability when properly credited. Defendant should
4 not be given endless opportunities to correct his mistakes while
5 plaintiff, who is of advanced age, Tr. 243, and has had her
6 application pending for more than six years, waits for an error-
7 free decision. See Hammock v. Bowen, 879 F.2d 498 (9th Cir. 1989)
8 (appropriate for court to credit improperly rejected testimony as
9 true when claimant was of advanced age and had already experienced
10 a severe delay in her application).

11 CONCLUSION

12 I recommend that the Commissioner's decision be reversed and
13 remanded for a determination of benefits.

14 SCHEDULING ORDER

15 The Findings and Recommendation will be referred to a district
16 judge. Objections, if any, are due November 24, 2009. If no
17 objections are filed, then the Findings and Recommendation will go
18 under advisement on that date.

19 If objections are filed, then a response is due December 8,
20 2009. When the response is due or filed, whichever date is
21 earlier, the Findings and Recommendation will go under advisement.

22 IT IS SO ORDERED.

23 Dated this 9th day of November, 2009.

24
25
26 /s/ Dennis James Hubel
27 Dennis James Hubel
28 United States Magistrate Judge